

FEDERAL COURT OF AUSTRALIA

Caratti v Commonwealth of Australia as represented by the Commissioner of Taxation [2017] FCA 70

File number: NSD 1829 of 2016

Judges: **ROBERTSON J**

Date of judgment: 10 February 2017

Catchwords: **TAXATION** – construction of Deed of Agreement – audit review by Commissioner of Taxation (**Commissioner**) of the taxpayer’s taxation affairs – as a result, Commissioner issued Notices of Amended Assessment (Amended Assessments) and Notices of Amended Assessment of shortfall penalty (Penalty Notices) to the taxpayer in respect of the years of income ended 30 June 2009, 30 June 2010 and 30 June 2011 – the parties remained in dispute as to the alleged taxation liabilities as described in the Amended Assessments and Penalty Notices – in exchange for securities given in accordance with the Deed, the Commissioner agreed to forbear from undertaking recovery action in respect of the Taxation Debt upon the terms and conditions set out in the Deed – Taxation Debt defined by reference to a sum “comprised of Tax-Related Liability and applicable GIC due and payable by the Taxpayer as at 7 August 2015, subject to any adjustment to those amounts by virtue of the Determination of the Objection Process” – whether Commissioner entitled to claim from the taxpayer, before the Determination of the Objection Process, general interest charge accrued since 7 August 2015

Legislation: *Income Tax Assessment Act 1997* (Cth) s 5-15
Taxation Administration Act 1953 (Cth) ss 8AAC, 8AAD, 8AAE, 8AAF, 8AAG, Sch 1 ss 255-1, 255-5

Cases cited: *Federal Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18; 163 CLR 199
Norman v Federal Commissioner of Taxation [1963] HCA 21; 109 CLR 9

Date of hearing: 1 February 2017

Date of last submissions: 6 February 2017

Registry: New South Wales

Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	62
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Solicitor for the Applicants:	Zafra Legal
Counsel for the Respondent:	Mr P Afshar
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 1829 of 2016

BETWEEN: **ALLEN BRUCE CARATTI**
First Applicant

APPLEY HOLDINGS PTY LTD (ACN 160 806 673) AS
TRUSTEE FOR THE BYFORD TRUST
Second Applicant

PLATINUM SKY PTY LTD (ACN 126 519 935)
Third Applicant

AND: **COMMONWEALTH OF AUSTRALIA AS REPRESENTED**
BY THE COMMISSIONER OF TAXATION
Respondent

JUDGE: **ROBERTSON J**

DATE OF ORDER: **10 FEBRUARY 2017**

THE COURT ORDERS THAT:

1. The parties endeavour to agree on the form of orders, including costs orders, to give effect to these reasons and file those agreed orders within seven business days of the date of this order. Failing agreement, the parties are to file the proposed orders for which they contend and to do so within the same seven business days of the date of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ROBERTSON J:

Introduction

1 This application concerns the operation of a deed of agreement dated 23 September 2015 made between the Commonwealth of Australia, as represented by the Commissioner of Taxation (the **Commissioner**), Allen Bruce Caratti, referred to as the taxpayer, and Appley Holdings Pty Ltd and Platinum Sky Pty Ltd, each referred to as the guarantor (the **Deed**).

2 The dispute between the parties is as to the Commissioner's entitlement now to recover from Mr Caratti general interest charge (**GIC**) of \$1,145,639.03 accrued since 7 August 2015. That is the amount specified in a letter from the Commissioner to Mr Caratti dated 9 September 2016. It is the applicants' position that that claim by the Commissioner is subject to the Commissioner's obligation under the Deed to refrain from commencing any proceedings to recover any part of the "Taxation Debt", as defined in the Deed.

3 Clause 6.1 of the Deed provides as follows:

The Commissioner agrees, subject to clause 11.2, to refrain from commencing any proceedings or employing his statutory "garnishee" power (pursuant to s260-5 of Schedule 1 of the TAA 1953) to recover any part of the Taxation Debt. For the sake of clarity, however, the Commissioner may employ any and all recovery options and powers to pursue any tax-related liabilities of the Taxpayer which are not part of the Taxation Debt which is the subject of this Deed, including any income tax liability that might be due following lodgement of the 2014 Income Tax Return.

4 The definition of "Taxation Debt" in the Deed is central to the dispute and is as follows:

Taxation Debt means the amount of \$10,948,507.45, which is comprised of Tax-Related Liability and applicable GIC due and payable by the Taxpayer as at 7 August 2015, subject to any adjustment to those amounts by virtue of the Determination of the Objection Process[.]

The background to the Deed

5 The background is sufficiently indicated by the recitals to the Deed which are in the following terms:

- A. The Commissioner of Taxation conducted an audit review of the Taxpayer's taxation affairs.
- B. As a result of the review, the Commissioner of Taxation has issued Notices of Amended Assessment (**Amended Assessments**) and Notices of Amended Assessment of shortfall penalty (**Penalty Notices**) to the taxpayer in respect of the years of income ended 30 June 2009, 30 June 2010 and 30 June 2011.

- C. The parties remain in dispute as to the alleged taxation liabilities as described in the Amended Assessments and Penalty Notices.
- D. In exchange for the Securities given in accordance with this Deed, the Commissioner has agreed to forbear from undertaking recovery action in respect of the Taxation Debt upon the terms and conditions set out in this Deed of Agreement.
- E. The Commissioner has agreed to accept the Securities in accordance with the terms of this Deed.
- F. In entering this Deed the parties do not intend to bind the Commissioner in relation to any income tax liabilities other than those which relate to the presently-established income tax liabilities for the 2009, 2010 and 2011 financial years.

6 The amended assessments and the notices of amended assessment of shortfall penalty referred to in recital B were in evidence. They were issued on 23 January 2015, with the date for payment being stated as 16 February 2015. On 1 April 2015, Mr Caratti lodged an objection against the amended assessments but those objections have not yet been determined.

7 The expression “income tax liability” is not defined in the Deed but “Tax-Related Liability” is defined to have the meaning of that term as described in Subdiv 255-A in Sch 1 to the *Taxation Administration Act 1953* (Cth) (the *TAA*). The relevant provisions in that Subdivision are as follows:

255-1 Meaning of tax-related liability

- (1) A *tax-related liability* is a pecuniary liability to the Commonwealth arising directly under a *taxation law (including a liability the amount of which is not yet due and payable).

Note 1: See section 250-10 for an index of tax-related liabilities.

Note 2: A taxation law, or a provision of it, may be excluded from being applied to this Part. See section 265-65.

- (2) A civil penalty under Division 290 of this Schedule or Part 5 of the *Tax Agent Services Act 2009* is not a *tax-related liability*.

255-5 Recovering a tax-related liability that is due and payable

- (1) An amount of a *tax-related liability that is due and payable:
- (a) is a debt due to the Commonwealth; and
 - (b) is payable to the Commissioner.
- (2) The Commissioner, a *Second Commissioner or a *Deputy Commissioner may sue in his or her official name in a court of competent jurisdiction to recover an amount of a *tax-related liability that remains unpaid after it has become due and payable.

Note: The tables in section 250-10 set out each provision that specifies when an amount of a tax-related liability becomes due and payable. The Commissioner may vary that time under Subdivision 255-B.

8 By s 5-15 of the *Income Tax Assessment Act 1997* (Cth) (the *ITAA*), if an amount of income tax or shortfall interest charge the taxpayer is liable to pay remains unpaid after the time by which it is due to be paid, the taxpayer is liable to pay the general interest charge on the unpaid amount for each day in the period for which it is unpaid. The provision is in the following terms:

5-15 General interest charge payable on unpaid income tax or shortfall interest charge

If an amount of income tax or *shortfall interest charge that you are liable to pay remains unpaid after the time by which it is due to be paid, you are liable to pay the *general interest charge on the unpaid amount for each day in the period that:

- (a) starts at the beginning of the day on which the amount was due to be paid; and
- (b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:
 - (i) the income tax or shortfall interest charge;
 - (ii) general interest charge on any of the income tax or shortfall interest charge.

Note 1: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953*.

Note 2: Shortfall interest charge is worked out under Division 280 in Schedule 1 to that Act.

9 The general interest charge is provided for by Pt IIA of the *TAA*, as follows.

10 By s 8AAC, the general interest charge for a day is worked out in accordance with that section. In general the charge is worked out by multiplying the general interest charge rate for that day by the sum of so much of the charge from previous days and the original unpaid amount as remains unpaid.

11 By s 8AAD, the general interest charge rate for a day is the rate worked out by adding 7 percentage points to the base interest rate for that day, and dividing that total by the number of days in the calendar year. The base interest rate for a day depends on which quarter of the year the day is in, and is related to the monthly average yield of 90-day Bank Accepted Bills published by the Reserve Bank of Australia for the appropriate month.

12 The general interest charge for a day is due and payable to the Commissioner at the end of that day: s 8AAE.

13 The Commissioner may give notice to a person liable to pay the charge of the amount of the charge for a particular day or days: s 8AAF.

- 14 The Commissioner may remit all or a part of the charge payable by a person, in accordance with s8AAG.

Other provisions of the Deed

- 15 By cl 6.4 of the Deed, the following provision was made:

The Taxation Debt will continue to accrue GIC daily from the due date for payment in accordance with and at the rate as may be applied from time to time under the TAA 1953.

- 16 It may be recalled that the definition of “Taxation Debt” in the Deed referred to the adjustment of the amounts by virtue of the Determination of the Objection Process. Clause 1.1 of the Deed contains the following definition:

Determination of the Objection Process means:

- (a) in relation to the income tax and shortfall penalty assessments for the 2009, 2010 and 2011 income tax years, an objection decision; and
- (b) where the Taxpayer lodges an application with the Administrative Appeals Tribunal under Part IVC of the TAA 1953 for review of an objection decision within the time prescribed by that Act, the delivery of a judgment by the Administrative Appeals Tribunal or otherwise upon the determination of the application for review effected by a withdrawal by the Taxpayer of his application; or
- (c) if the Taxpayer seeks the alternative course of appealing to the Federal Court of Australia under Part IVC of the TAA 1953 from an objection decision within the time prescribed by that Act, the delivery of a judgment by the presiding judge or judges of the Federal Court of Australia or otherwise upon the determination of the appeal effected by a withdrawal or discontinuance by the Taxpayer of his appeal or by reason of the insolvency of the Taxpayer; or
- (d) if an appeal is lodged to the Full Federal Court of Australia within the time allowed for doing so by either the Taxpayer or the Commissioner from a decision referred to in the paragraphs above, the delivery of a judgment by the Full Federal Court of Australia or otherwise upon the determination of the appeal effected by a withdrawal or discontinuance by the appellant, whether that be the Taxpayer or the Commissioner, or by reason of the insolvency of the Taxpayer; or
- (e) if special leave to appeal to the High Court of Australia against a decision referred to in the foregoing paragraph is applied for and granted, the delivery of a judgment of the High Court of Australia, or otherwise upon refusal of any application for special leave.

- 17 These clauses reflect the objections, reviews and appeals provisions of Pt IVC of the *TAA*. The Deed contains a definition of “Objection process” to mean objection, application for review to the Administrative Appeals Tribunal (the **AAT**) under Pt IVC of the *TAA*, appeal to the Federal Court of Australia under Pt IVC of the *TAA*, appeal to the Full Federal Court of

Australia, application for special leave to appeal to the High Court of Australia and/or appeal to the High Court of Australia.

18 Clause 6.5 of the Deed is as follows:

The Commissioner will be entitled to exercise his recovery powers in respect of the Taxation Debt, and enforce the Securities for payment as from and after the 30th day after the Determination of the Objection Process.

19 By cl 4.1(j), the taxpayer agrees to pay the Commissioner, within 30 days of the Determination of the Objection Process, the entire amount of any part of the Taxation Debt which remains due to the Commissioner.

20 Turning to the securities, in support of the Taxpayer's obligations under the Deed, the guarantors, the second respondent and the third respondent, agreed to grant to the Commissioner "Securities", defined to mean the mortgages detailed in Item 1 of Sch 1 to the Deed, ranking as a second mortgage.

21 The Deed contains a definition of "Equity Value" to mean the market value of the asset that is or is to be subject of a Security less the amount of any debt that is to take priority to the Security. By cl 3.4 the parties agreed that where the Equity Value of all assets over which the Security was granted is in excess of the Taxation Debt, the extent of the Security given is limited to the amount of the Taxation Debt and "the assets in question and any additional Equity Value beyond the Taxation Debt are available to be used to satisfy another requirement to provide security to the Commissioner under another agreement ...".

The submissions of the parties

22 The applicants contend that the subject matter of the Deed is those tax-related liabilities for particular tax periods under dispute in Pt IVC proceedings, which include primary liabilities, penalty liabilities, and the GIC on those liabilities. They contend that the Deed identified only what was the total of those liabilities as at 7 August 2015, whereas the Commissioner contends that the subject matter of the Deed was only that total and that he could calculate and recover any amount beyond that total despite it being the subject of the Pt IVC proceedings.

23 The applicants contend that at the conclusion of any successful stage of the Pt IVC process, the Commissioner must issue corrected assessments and recalculate the GIC by reference to those corrected amounts. The applicants also contend that on any given day the total of the

tax-related liabilities under dispute in Pt IVC proceedings can be calculated, but the Tax Acts do not stop operating in respect of GIC by reason of any stand-still agreement. That is, the amount that is disputed gets larger and larger as each day passes. That was the context in which the Deed was agreed.

- 24 The applicants contend that the amount of the Taxation Debt is not fixed but is variable in two ways: first, the amount is increasing daily by the amount of applicable GIC accruing on the amounts the subject of the Amended Assessment and Penalty Notice and, second, by any adjustment arising to these amounts following the conclusion of the Pt IVC proceedings.
- 25 The applicants submit that as GIC is included in Tax-Related Liability, the words “and applicable GIC due and payable” in the definition of Taxation Debt do not add anything to defining what comprises the Taxation Debt. But the word “applicable” serves to emphasise its inclusion as the amount that applies to the disputed Amended Assessment and Penalty Notice components of the Taxation Debt. Like those amounts, it is subject to adjustment and is not to be recovered pending the outcome of the Pt IVC proceedings. Thus, the applicants submit, whilst a dollar amount as of a certain date is stated within the definition of Taxation Debt, it is apparent that this amount merely is a calculation as at that date of what is disputed and does not remain static with the passage of time. Until the Determination of the Objection Process, the disputed total amount, always subject to adjustment, is increasing daily on account of GIC accruing. The definition of Taxation Debt includes a stated amount of \$10,948,507.45 reflecting the calculation of GIC up to a particular date, 7 August 2015, but is not confined to or limited by that date.
- 26 When read objectively, the applicants submit, in conjunction with cl 6.4, the intended meaning was that the Taxation Debt comprised all the amounts subject to adjustment under the Pt IVC proceedings, which includes the GIC in respect of the primary and penalty assessments for the 2009 to 2011 years.
- 27 The applicants submit that all the tax-related liabilities that comprise the Taxation Debt (including GIC accrued since 7 August 2015) which depend on the determination of the Pt IVC process and may be adjusted by that process cannot be recovered whilst the taxpayer and the Guarantor are complying with their obligations.
- 28 The respondent Commissioner submits that the phrase “Taxation Debt” in the Deed is a reference to the specific amount of \$10,948,507.45 (subject to adjustment by a court or the

AAT). GIC accrued after 7 August 2015 is specifically excluded from the definition of “Taxation Debt”. That interpretation is supported by the definition of “Taxation Debt”, provisions in the Deed that envisage the continued accrual of GIC (cl 6.4) and provisions that envisage the existence of debts that fall outside the definition of “Taxation Debt (cl 6.1). “Taxation Debt” does not have a “variable” definition as the applicants suggest. The applicants’ construction of the term “Taxation Debt” ought to be rejected as being without any proper basis and being unsupported by the language of the Deed.

29 The Commissioner submits that when parsed correctly, it is clear that the definition of “Taxation Debt” is restricted to the amount of \$10,948,507.45 (as adjusted by the Determination of the Objection Process). What follows the first comma is an exhaustive list of the constituent parts of the “Taxation Debt”.

30 The Commissioner submits that the language is specific and limiting and that the constituent parts of the “Taxation Debt” are “Tax-Related Liability”, defined by reference to the meaning given to that term in Subdiv 255-A, with the definition in the Deed specifically providing for the inclusion only of certain GIC within the scope of “Taxation Debt” and GIC due and payable by the Taxpayer as at 7 August 2015.

31 The Commissioner submits that there is nothing in the words of the definition that expanded it to include the amount in dispute of \$1,145,639.03, being GIC accrued since 7 August 2015. There are no words in the definition that provide a mechanism for any daily increase of the “Taxation Debt” as the applicants suggest.

32 The Commissioner submits that it is clear that GIC is included in the definition only in so far as it had accrued up to 7 August 2015. The word “payable” is followed by “the Taxpayer as at 7 August 2015”. The limiting date would not have been included if the parties had intended for all GIC accruing beyond that date also to be included in the scope of “Taxation Debt”.

33 The Commissioner submits that the final section of the definition does not provide a mechanism for the ongoing “daily” or regular adjustment of “Taxation Debt”.

34 The Commissioner relies on cl 6.4, submitting that that clause would have been unnecessary if “Taxation Debt” had included GIC that accrued after 7 August 2015. He submits that the language of cl 6.1 also supports his construction as the carve-out in the second sentence of cl 6.1 encompasses the GIC that accrues after 7 August 2015.

- 35 The Commissioner drew attention to recital F which refers to the “presently-established” income tax liabilities.
- 36 The Commissioner also relied on the provisions of the Deed for the provision of securities and additional securities in certain circumstances.
- 37 In reply, the applicants submit that the dollar amount stated by the Commissioner in his submissions is not an independent additional sum but simply the very same GIC which is the subject of adjustment at the conclusion of the Pt IVC proceedings, but calculated at a different date.
- 38 The applicants submit that a reasonable person would ask “which liabilities are subject to adjustment?”, and this question is answered by reference to what was meant by a dispute under Pt IVC and produces the answer contended for by the applicants.
- 39 The applicants submit that the Commissioner’s construction should be rejected immediately once it is appreciated that the Commissioner or the AAT standing in the Commissioner’s shoes or this Court can increase the primary tax and/or the penalty tax and thus the GIC before the contemplated conclusion of the Pt IVC proceedings.
- 40 The applicants submit that the respondent misses the point that the parties agreed that the GIC would continue to accrue and that this “precludes the applicants from arguing that the nominated amount as at 7 August 2015 is not the limit of its total liability in the relevant years, and may well be increased by the time of the conclusion of the Pt IVC proceedings (if unsuccessful).”
- 41 The applicants submit that “the Taxation Debt grows daily by the amount of the applicable GIC and may grow further or may reduce depending on how the primary tax or the penalty tax are adjusted under the Pt IVC proceedings.” The Deed cannot be read to introduce an arbitrary separate treatment of GIC accruing as a separate independent debt outside the contemplation of the parties as part of the subject matter of the Deed. “The GIC is subject to adjustment under Pt IVC proceedings. That it accrues is one thing. That it can be recovered pending the outcome of the Pt IVC proceedings that will lead to its adjustment is quite another.”

Consideration

42 The central provision in the Deed is the following definition, set out above but repeated for convenience:

Taxation Debt means the amount of \$10,948,507.45, which is comprised of Tax-Related Liability and applicable GIC due and payable by the Taxpayer as at 7 August 2015, subject to any adjustment to those amounts by virtue of the Determination of the Objection Process[.]

43 There are, in my opinion, two matters on which to focus. The first is that the Taxation Debt is the amount stated, \$10,948,507.45. The second is that this figure is subject to any adjustment to “those amounts”, being, in context, the Tax-Related Liability and applicable GIC due and payable as at 7 August 2015, by virtue of the Determination of the Objection Process.

44 It is the second of these matters which adds complexity. On one view the adjustment would be made once the objection process is at an end because it had reached its termination. But a major purpose of the Deed is, subject to its terms and conditions, to prevent the Commissioner from recovering any part of the Taxation Debt while the Objection Process is continuing. There does not seem to be much sense in the Taxation Debt being adjusted at a point in time when the Commissioner is no longer constrained by the Deed from taking recovery action. On another view, any adjustment would be during the course of the Objection Process so that the amount the Commissioner may not recover would be the amount which reflected the decision made at a particular stage of the Objection Process from time to time.

45 For present purposes, however, the greater significance is in the words “adjustment ... by virtue of the Determination of the Objection Process”.

46 The Deed must operate in the context of the relevant statutory provisions, including the general interest charge for each day “due and payable to the Commissioner at the end of that day”: see s 5-15 of the *ITAA* and s 8AAE of the *TAA*. It was common ground that the amount of GIC increased from day to day.

47 In my view the preferable construction is that the daily increase in the amount of the GIC by virtue of the statute is not an “adjustment” to the GIC due and payable as at 7 August 2015 “by virtue of the Determination of the Objection Process”. It follows that that daily increase would not form part of the “Taxation Debt” as defined in the Deed.

- 48 A major purpose of the Deed is, subject to its terms, to postpone the recoverability of the amounts assessed and to prevent proceedings to recover any part of the Taxation Debt until the Determination of the Objection Process in light of the dispute between the parties as to “the alleged taxation liabilities as described in the Amended Assessments and Penalty Notices”: see recital C of the Deed.
- 49 Another important part of the Deed deals with the granting of securities. There is provision in cl 3.4 as to excess equity, where the Equity Value of the assets over which security is granted is in excess of the Taxation Debt. In my view, this operates by reference to the amount of \$10,948,507.45 as stated in the definition of Taxation Debt but as adjusted. If, for example, the Taxation Debt was substantially reduced by the AAT or by a court, the Equity Value of the assets over which security is granted is likely to be in excess of the Taxation Debt. There could then be a corresponding adjustment, in the same way as where the Equity Value, by reference to the market value, of the asset may increase so as to be in excess of the Taxation Debt independent of any adjustment to the Taxation Debt.
- 50 However, this construction of “Taxation Debt” and “Determination of the Objection Process” does not necessarily mean that the GIC, calculated by reference to the amount determined to be the Tax-Related Liability from time to time, is presently recoverable.
- 51 The submission on behalf of the applicants is that the purpose of the Deed is to prevent the Commissioner from recovering all the amounts that are subject to adjustment, including the GIC, until the Objection Process has been determined. Further, the applicants submit, the GIC is not a separate independent amount but is inextricably linked with the amounts of the primary tax, the penalties and the shortfall interest. The submission seems to be that because the non-GIC components are not to be recovered, and are inherently adjustable, the later accruing GIC, because it is inherently adjustable, is also not to be recovered. I do not accept this submission for the reason that, as I have indicated, I do not regard the GIC accruing on and from 8 August 2015 by virtue of the statute as falling within the words “adjustment” “by virtue of the Determination of the Objection Process”.
- 52 The applicants refer in this context to *Norman v Federal Commissioner of Taxation* [1963] HCA 21 at [10]; 109 CLR 9 per Windeyer J for the proposition that “A creditor cannot recover a debt piecemeal in a court of law.” But in my opinion his Honour was there referring to the position in relation to the assignment of part of a debt and making the point that an assignment of part of a debt was necessarily an equitable assignment.


- 53 The applicants also refer to *Federal Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18; 163 CLR 199 for the proposition that even where an obligation to pay interest is under an independent covenant to pay interest, it is still inextricably linked with the principal amount. The applicants then put that, given that it was common ground that the primary tax was inherently subject to adjustment, the GIC was at any particular point in time uncertain and so could not be recovered.
- 54 In my opinion, *Myer Emporium* is far from the present context: it concerned whether or not the loan agreement and the assignment of interest were interdependent as integral elements in one profit-making scheme and thus whether the consideration received for the assignment was income.
- 55 That the GIC due and payable after 8 August 2015 is recoverable during the Determination of the Objection Process means that it could well require later adjustment depending on what, on the Determination of the Objection Process, the Taxation Debt was determined to be. However I do not see this as putting the recoverability of the GIC in any exceptional position: it must often be recalculated at the end of any objection, review and appeal process.
- 56 In my opinion, the better construction is that the specified sum, of \$10,948,507.45, is the dominant provision of the definition of “Taxation Debt” and that definition then explains that it is comprised of Tax-Related Liability and applicable GIC, due and payable by the Taxpayer as at 7 August 2015. Those amounts, the Tax-Related Liability and applicable GIC as at 7 August 2015, are then, in that definition, said to be and are adjustable by virtue of the Determination of the Objection Process and, as a consequence, the specified sum is so adjustable.
- 57 Lest the GIC be thought not to be accruing because the Tax-Related Liability is, for a period, not recoverable by the Commissioner, cl 6.4 states that the entirety of the Taxation Debt will continue to accrue GIC daily. I accept the Commissioner’s submission that the words “as at 7 August 2015” are determinative of the extent to which GIC is included in the definition of “Taxation Debt”. I do not accept however the applicants’ submission that what can be adjusted is the Tax-Related Liability and applicable GIC due and payable by the Taxpayer as at the end of the objection process and that therefore any applicable GIC at that point falls within the definition of Taxation Debt.

- 58 It is the amount of \$10,948,507.45 as adjusted, up or down, by the decisions or judgments referred to in the definition of “Determination of the Objection Process” which the Taxpayer agrees to pay the Commissioner, within 30 days of the Determination of the Objection Process (cl 4.1(j)) and the sum which the Commissioner, by cl 6.1, agrees to refrain from commencing proceedings to recover until after the 30th day after the Determination of the Objection Process (cl 6.5).
- 59 A consequence of this construction is that, by cl 5.1(a), the guarantor agrees to assume liability for and guarantees to the Commissioner payment of the Taxation Debt which does not include the GIC due and payable by the Taxpayer on and from 8 August 2015. On the construction I prefer, the GIC accruing after 7 August 2015 is not the subject of the guarantee but is recoverable as not subject to cl 6.1.
- 60 A further consequence of this construction is that cl 3.4, dealing with Excess Equity, operates by reference to the Taxation Debt excluding any GIC payable by the Taxpayer on and from 8 August 2015.
- 61 I do not regard these consequences as having a significant bearing on the proper construction of the expression “Taxation Debt”. It is open to the parties when entering into a Deed such as this to provide for a guarantee and securities so as to reflect a taxpayer’s obligations as properly understood. If the parties wish to provide for a guarantee and securities beyond the amount of the Taxation Debt then they are at liberty to do so.

Conclusion and orders

- 62 I will hear the parties on the appropriate form of orders and in relation to costs. I direct that the parties endeavour to agree on the form of orders, including costs orders, and to file those agreed orders within seven business days of the date of the order. Failing agreement, the parties are to file the proposed orders for which they contend and to do so within the same seven business days of the date of the order.

I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate: 

Dated: 10 February 2017